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SUPREME COURT, U.S.

No. 98-490

In The

Supreme Court of the United States

October Term, 1998

ALBERT BOSSLEY, ET AL.,

Petitioners,

v.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL W. EADY
Counsel of Record
BROWN MCCARROLL & OAKS HARTLINE, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701-4043
(512) 472-5456
Counsel for Respondents, John Kamphaus, M.D. and Harold Urschel, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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OBJECTIONS TO CONSIDERATION OF QUESTIONS PRESENTED AND JURISDICTION

1. Drs. Kamphaus and Urschel object to the consideration of the deposition testimony of Domingo Davila (Petitioners' App. 63-67) and Laura Moore (Petitioners' App. 68-69). Neither testimony was properly before the trial court, nor made part of the record on appeal.

2. Drs. Kamphaus and Urschel object to the consideration of Petitioners' third question on grounds that the record does not support the factual predicate that waiver of sovereign immunity was pled as being limited to the acts and omissions of Angela Jones.

3. Drs. Kamphaus and Urschel object to the consideration of Petitioners' Appendix p. 62, as not properly part of the appellate record.

4. Drs. Kamphaus and Urschel object to this Court's jurisdiction on grounds that Petitioners failed to timely and adequately present the questions in their petition to the state courts, none of the three questions presented involve substantial federal questions, and the questions raised only involve matters of interpretation of state law.

STATEMENT OF THE CASE

Respondents, Drs. Kamphaus and Urschel, disagree with the Petitioners' (hereinafter "the Bossleys") statement of the case.

In support of their contention that the Texas Supreme Court improperly made findings of fact outside its proper jurisdiction, the Bossleys refer to the testimony of Domingo Davila and Laura Moore. (Petition at p. 10.) The

Bossleys ignore the fact that this testimony was never part of the trial record or the appellate record.

At trial, in response to the pending motions for summary judgment, the Bossleys gave "notice of intent to use non-filed specified discovery." App. 12-13. This was nothing more than a list of all depositions taken in the case. All the depositions were, however, not on file at the time of the summary judgment hearing or attached to the Bossley's response to the pending motions for summary judgment. App. 15-40. Once the appeal was taken, the Bossleys moved the Court of Appeals in Dallas for leave to supplement the record with *certain* of the depositions referenced in this listing. Initially, that request concerned only the depositions of Albert Bossley, Elaine Bossley (Vol. II), John Kamphaus, M.D., and Harold Urschel, M.D. App. 41-43. That motion was not only denied, but the clerk was "directed to return the depositions to the Bossleys' counsel. App. 44. Later, the Bossleys again moved to supplement the record. This time, they requested leave to make part of the record the depositions of Danny Williams, Angela Jones, Florence Bates, Harold Urschel, M.D., and John Kamphaus, M.D. App. 49-53. Again, the motion was denied because the Bossleys failed to properly authenticate such proof as required under then prevailing Texas precedent. App. 54.

Never once during the entire eight years this case was on appeal did the Bossleys ever complain on appeal about the exclusion of this evidence from the record, and in particular the depositions of Domingo Davila and Laura Moore. Hence, the deposition testimony of Domingo Davila and Laura Moore was never part of the record. The Bossleys attempt to interject this evidence

into the record by "attaching" these excerpts to their motion for rehearing before the last court of resort in Texas did not somehow make such testimony a proper part of the record.

Based upon the record before the trial court, the Texas Supreme Court's factual statement of the events leading up to Roger Bossley's death was not only correct, but uncontradicted.[1]

ARGUMENTS FOR DENYING PETITION

The Bossleys have three basic complaints. First, they disagree with the Texas Supreme Court's factual recitation of the underlying incident. According to the Bossleys, the Texas Supreme Court's alleged failure to accept the Bossleys' version of what occurred constitutes a violation of due process. Second, the Bossleys' claim (for the first time ever) that the Texas Supreme Court lacked jurisdiction to adjudicate their claims against Dallas County Mental Health and Mental Retardation (hereinafter "MHMR") because the Bossleys voluntarily dismissed MHMR as soon as they received notice by letter from the trial court that MHMR's motion for summary judgment would be granted. They claim this, too, constituted a violation of due process. Third, the Bossleys re-argue

[1] Footnote 1 of the Bossleys' petition is revealing. The Texas Supreme Court's recitation of the underlying facts was taken from the Court of Appeal's opinion. The Bossleys admittedly never complained about the Court of Appeal's factual recitation. The reason that particular description of the facts was carried forward is because that is what the actual record reflects.

their interpretation of § 101.106 of the Texas Tort Claims Act claiming that the interpretation by the Texas Supreme Court was arbitrary and capricious and therefore a due process violation.

None of these three questions, even if true, would present a "substantial federal question." Other reasons for denying the Bossleys' petition follow.

A. The Bossleys have failed to establish that their federal claims were adequately presented to the State system.

This Court will not review a final judgment under 28 U.S.C. § 1257(a) unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Dirs. of Rotary Intern. v. Rotary Club*, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 95 L. Ed. 474 (1987) (*quoting Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981)). It is well established that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . " *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128, 65 S. Ct. 1475, 1480, 89 L. Ed. 569 (1945). The Bossleys did not present the federal issues raised in their petition until they filed their motion for rehearing with the Texas Supreme Court. The Bossleys' motion for rehearing was denied without opinion.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state

courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, 103 S. Ct. 2296, 2301, n.3, 76 L. Ed. 2d 497 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969))). No such showing has been made. The Bossleys lost at the trial court level. Procedurally, they were in the same position as they are now. The general practice of Texas appellate courts is not to consider issues raised for the first time on appeal. *Newman v. King*, 433 S.W.2d 420 (Tex. 1968).

B. The Bossleys lack any claim for violation of due process.

Are the Bossleys making a claim for a violation of substantive due process or procedural due process? The Bossleys' petition is unclear. Regardless of the claim, neither is valid.

1. Substantive due process.

The underlying cause of action was one for wrongful death. That claim for wrongful death was made against the State of Texas. But, because of sovereign immunity, the claim could only be prosecuted within the confines of the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code § 101.001 *et seq*. Hence, one must examine not one, but two, separate statutory schemes.

Under the common law, there existed no right to the recovery for wrongful death. *See Baker v. Bolton*, 1 Camp.

493, 170 Eng. Rep. 1033 (1808). In 1846, the English Parliament passed the Fatal Accidents Act, otherwise known as Lord Campbell's Act, which created a statutory cause of action for death. In 1860, the Texas Legislature enacted the original Texas Wrongful Death Statute patterned after Lord Campbell's Act. The statute provides the exclusive remedy for wrongful death in Texas. Tex. Civ. Prac. & Rem. Code § 71.001 *et seq.*

Likewise, at common law municipalities performing governmental functions were completely immune from liability. The Texas Tort Claims Act created a limited waiver of that immunity. *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995).

The due process clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in a society." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 127, 112 S. Ct. 1061, 1070, 117 L. Ed. 2d 261 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). The substantive component of the due process clause protects only those rights which are fundamental. *Wooten v. Campbell*, 49 F.3d 696, 699 (11th Cir.), cert. denied, 516 U.S. 943 (1995).

There is no fundamental right involved in this case. Both the Bossleys' wrongful death claim and the claim against the State of Texas are claims entirely statutory in nature.

Nonetheless, the Bossleys contend that their wrongful death claims are a protected "property" interest. This

Court has held that arguably a cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. *See Martinez v. State of Cal.*, 444 U.S. 277 281-82, 100 S. Ct. 553, 557-58, 62 L. Ed. 2d 481 (1980). However, "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the State rule is in conflict with federal law." *Id.* at n.5 *quoting Ferri v. Ackerman*, 444 U.S. 193, 198, 100 S. Ct. 402, 406, 62 L. Ed. 2d 355 (1979). Defenses, including "immunity defenses," are like an element of the tort claim itself, and are merely one aspect of the State's definition of that property interest. *Id.*

Substantive due process claims not involving a fundamental right are reviewed under the rational basis test. *TRM, Inc. v. U.S.*, 52 F.3d 941, 945 (11th Cir. 1995). This test is generally easy to meet. The task for the Court is to determine if any set facts may be reasonably conceived to justify the legislation. *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1241 (11th Cir. 1991).

One can effortlessly identify the basis for limiting suits against the state, and affording immunity to state employees. First and foremost, it protects the taxpayers of the State; and second, it allows the State to perform its governmental duties rather than defend civil lawsuits. Likewise, the State has a valid basis for extending protection under § 101.106 of the Texas Tort Claims Act. The purpose of § 101.106 is to protect public employees, encourage qualified people to accept work for the state in typically low-paying jobs, encourage fearless decision-making, and not place these same people in a position of buying their own liability insurance. It also forecloses the

loophole of suing governmental employees as an end run of the Texas Tort Claims Act damage limitations. Both § 101.106 of the Texas Tort Claims Act, and the Texas Supreme Court's opinion in this case support those laudatory goals.

One must keep in mind in this case that Roger Bossley was originally involuntarily committed to the Hillside Center Facility by a state probate judge. A judge, and not a mental health professional, chose the appropriate facility, which was not the state hospital. The Hillside Center is primarily an out-patient center and Roger Bossley had in fact returned home for visits after his initial commitment. Immediately before the transfer Roger Bossley was not an elopement suicide risk.[2] One must remember that

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[2] Elopement and suicide are two separate and very distinct mental health concepts. These concepts do not have a one-on-one relationship. A patient may attempt to "escape" or "elope" for any of a variety of reasons. A patient considered a suicide risk may not be an elopement risk, and vice versa. It is not necessary to elope to commit suicide.

This case is a prime example. The proof the Bossleys attach to *their response* to the motion for summary judgment of John Kamphaus, M.D. and Harold Urschel, M.D. contained the following excerpted deposition testimony:

> Q What steps did you take to ensure that Roger would not leave the facility?
>
> A None.
>
> Q Why not?
>
> A He showed no reason. He had just been on a weekend pass. He didn't have any intention of the [sic] leaving the facility, as far as I was concerned. He had free roam of the facility. He could have left, you know, I probably got there in the

the transfer to the Mental Diagnostic Center was for therapeutic reasons, and that he assaulted an MHMR employee to escape. Civil liability in this situation does not encourage therapeutic transfers nor it is consistent with the patients' bill of rights which is statutory in Texas. State employed mental health professionals like Drs. Kamphaus and Urschel have no choice in treating individuals like Roger Bossley who are involuntarily committed to the custody of the State. They treat such individuals utilizing only the limited resources which the

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evening, he could have left at 6:00. He was still there.

App. 29.

Q Wouldn't that make it foreseeable under those conditions that Roger would try to leave the facility?

A Not necessarily. People tell me that all the time, that they don't want to go to Terrell, and they don't always try to elope.

Q But if a person, but if Roger is telling you that he doesn't want to go to Terrell State Hospital, don't you then have a duty to make sure that Roger doesn't try another alternative, in other words, escape the facility, elope?

A Well, I think it depends on the degree to which you think it's likely that he's going to elope. I didn't think there was a high likelihood of that, given his past behavior at Hillside and given things that he was saying to me at that point in time.

App. 19.

One should not blindly assume that Roger Bossley was an elopement risk simply because of concerns that he might be a danger to himself.

State has available and in accordance with the Texas Mental Health Code. If rehabilitation and return to society is the goal, then those professionals must be able to use their discretion without the spector of liability. Clearly, immunity furthers that important state interest and is rationally related to achieving these goals.

The Bossleys do not complain about the facility or even the commitment. What they complain about is being denied the right to collect money for second-guessing treatment decisions made within the strict confines of the Texas Mental Health Code. Their claim does not involve either a fundamental right or even a facially valid substantive due process claim.

Whether one agrees or disagrees with Texas' decision to provide absolute immunity to the employees of the governmental unit when the government unit is protected by sovereign immunity, one cannot deny that it rationally furthers a policy that reasonable lawmakers favor. *Martinez v. State of California,* 444 U.S. at 283, 100 S. Ct. at 558. Federal courts have no authority to pass judgment on the wisdom of the underlying policy determination. *Id.* A state legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrary. *Id.*

2. Procedural due process.

If the Bossleys are not making a substantive due process claim, are they then making a procedural due process claim? Did the Bossleys have some "property interest" which they were deprived of without adequate process?

The Bossleys claim that their wrongful death case is a "property interest" under Texas law. Although the state wrongful death statute may have created this cause of action as property interest, the sovereign immunity statute defined the property interest. In essence, the property interest involved in this case is not protected because MHMR is the defendant. *See Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441, 445 (5th Cir. 1991).

Nevertheless, if we assume the existence of a protected property interest, how were the Bossleys denied adequate process? They never complained to the Texas Supreme Court about the Court of Appeal's refusal to allow the Bossleys to supplement the record on appeal with testimony referenced in their response to the summary judgment motions. Likewise, they never complained that the trial court erred in denying their motion to nonsuit MHMR. The opportunities were available. They had the opportunity to contest the sovereign immunity scheme during the entire appeal process. They did not do so. Consequently, no violation of procedural due process occurred.

C. The issues in the Bossleys' petition involve matters of state law, not within this Court's jurisdiction.

1. The record does not support the Bossleys' factual contentions that the Texas Supreme Court exceeded its own jurisdiction.

> *"The Court's legal reasoning apparently is that Roger's purported act of hitchhiking on both sides of the highway before jumping in front of a*

> *truck for the first time broke the chain of proximate causation."*
>
> Petition, p. 9.
>
> *"The Supreme Court's refusal to consider the correct facts in its analysis is a fundamental violation of its jurisdiction and therefore a violation of due process . . . "*
>
> Petition, p. 10.

The Bossleys argument that the Texas Supreme Court lacked jurisdiction to decide contested facts proceeds from a faulty assumption. It assumes the existence of "contested facts," which is an incorrect one based upon the record before the trial court. Under Texas law, the trial court considers the record only as it properly appears when the motion for summary judgment is heard. *Brown v. Prairie View A&M University*, 630 S.W.2d 405, 411 (Tex. App. – Houston [14th Dist.] 1982, writ ref'd n.r.e.). Likewise, an appellate court can only review the evidence properly before the trial court at the time of the hearing. *Evans v. Conlee*, 741 S.W.2d 504, 510 (Tex. App. – Corpus Christi 1987, no writ). More particularly, depositions which are not part of the record before the trial court at the time of the summary judgment hearing are not considered on appeal. *Nicholson v. Memorial Hosp. Sys.*, 722 S.W.2d 746, 749 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Lee v. McCormick*, 647 S.W.2d 735, 736 (Tex. App. – Beaumont 1983, no writ); *I. P. Farms v. Exxon Pipeline Company*, 646 S.W.2d 544, 545 (Tex. App. – Houston [1st Dist.] 1982, no writ). Hence, the summary judgment record consists only of the summary judgment evidence attached to the respective motions for summary

judgment of Drs. Kamphaus, Urschel, MHMR and the MHMR employees and the Bossleys' response thereto.

The testimony of Domingo Davila and Laura Moore which the Bossleys now refer was not properly before the trial court and was not made part of the record for that reason. Without this testimony in the record the Bossleys' argument that the Texas Supreme Court exceeded its jurisdiction must fail.

The Bossleys also misinterpreted the Texas Supreme Court's opinion. And, as in other places, the Bossleys unnecessarily complicate relatively simple issues. To sue a governmental unit, the Bossleys had to establish that Roger Bossley's death was "caused by a condition or use of tangible or real property." Tex. Civ. Prac. & Rem. Code § 101.021(2). This facility had two doors. One which was locked and the other which was unlocked (inner door). Roger Bossley assaulted Angela Jones while in the process of unlocking the outer door and leaving for lunch. The failure to "lock" the inner door is the "condition" upon which the Bossleys rely to waive sovereign immunity under the Texas Tort Claims Act. However, because of the problem of claimants "pleading around," § 101.021(2) and rendering it meaningless, courts are required to "pierce" the pleadings. *See Hopkins v. Spring Indep. School Dist.*, 736 S.W.2d 617 (Tex. 1987). The Bossleys' core allegation involved "suicide precautions." The Bossleys continually get tangled up in their pleadings, as if their pleadings were the sole consideration. The door lock had nothing to do with Roger Bossley's death, regardless of what the Bossleys pled to waive sovereign immunity. The door lock is merely something which "appears" in the facts and at best was arguably involved

in the sequence of events. The door lock did not kill Roger Bossley. At some point, allegations which attempt to waive sovereign immunity became "too attenuated." As the Texas Supreme Court aptly put it:

> *The real substance* of plaintiffs' complaint is that Roger's death was caused, not by the condition or use of property, but by the *failure of the Hillside's staff to restrain* him once they learned he was still suicidal. The Tort Claims Act does not waive Dallas County MHMR's immunity from such a complaint.

Petitioners' App. at p. 10. (emphasis added)

2. The Bossleys' due process claims involving their failed attempt to nonsuit MHMR merely re-argue Texas State proceeded law.

The Bossleys also claim a violation of due process based upon an interpretation of Tex. R. Civ. P. 162. The base premise is that as a matter of Texas law the Bossleys' nonsuit of MHMR was effective.

Proceeding from that erroneous contention they then argue that every Texas court from the trial court through the Texas Supreme Court lacked jurisdiction to render a judgment in favor of MHMR and that a judgment rendered by a court without jurisdiction violates due process. While the last contention may be correct, it necessarily is premised upon an application and interpretation of Tex. R. Civ. P. 162, which is contrary to that suggested by the Bossleys.

Under Texas law, a plaintiff may voluntarily dismiss claims against a defendant, "[A]t any time before the

plaintiff has introduced all of his evidence other than rebuttal evidence." Tex. R. Civ. P. 162. This is a procedural rule.

Despite the statements in their petition to the contrary, the Bossleys took an appeal from the judgment *in favor of all the defendants*, not just the individual defendants. App. 55-79. No point of error was ever raised by the Bossleys with respect to the lack of jurisdiction of the trial court, nor that the trial court erred in denying the motion for non-suit. App. 62. The issue is first raised on motion for rehearing before the Texas Supreme Court. That motion for rehearing was denied, thereby indicating that the Texas Supreme Court reviewed the Bossleys' jurisdictional arguments and rejected those arguments.

The Bossleys' contentions here are not properly directed to the root premise – the correct application of Tex. R. Civ. P. 162. There can be no due process argument since the application of this state procedural rule defining the circumstances of when a party may voluntarily dismiss claims involves no constitutional considerations, and the Bossleys do not contend otherwise.

The Bossleys do not contend that the interpretation of Tex. R. Civ. P. 162 was arbitrary and capricious. There is no fundamental right involved. Rule 162 is rationally founded on a policy decision not to allow litigants, like the Bossleys, to voluntarily drop their claims and deprive a defendant of its right to judgment once the trial court "announces" its decision. In fact, in Texas, once the motion for summary judgment is under submission, a plaintiff may not resort to Tex. R. Civ. P. 162. *Extended Services Program Inc. v. First Extended Service Corp.*, 601

S.W.2d 469, 471 (Tex. Civ. App. – Dallas 1980, writ ref'd n.r.e.). If Tex. R. Civ. P. 162 as applied in this case does not violate due process, then this Court has no jurisdiction to consider the Bossleys' complaints that the Texas Supreme Court rendered a judgment beyond its jurisdictional power. The key, or linchpin, is the interpretation of Tex. R. Civ. P. 162. And, on that issue, the Bossleys make no constitutional challenge, nor could they. Instead, they devote their argument to re-arguing a question of state law on when they could nonsuit MHMR and when that motion to nonsuit remained valid.

3. The Bossleys' due process challenge to the Texas Supreme Court's interpretation of Section 101.106 is factually and legally flawed.

> *" . . . only the acts of Angela Jones could have given rise to the claims against her employer MHMR."*
>
> Petition at p. 15.

Why were the Bossleys not content with a straightforward action against MHMR? Every doctor, nurse and assistant who saw Roger Bossley was sued. Their plain intent was to circumvent the $100,000 damage limitation. Like all tort claims acts, the Texas Tort Claims Act limits the State's liability. In Texas, the limit is $100,000 for "units of local government" like MHMR. Tex. Civ. Prac. & Rem. Code § 101.023(b). The attempt to circumvent these statutory limitations was improper, but it explains the sequence of events which followed. All the defendants moved for summary judgment. The trial court "rendered" judgment in favor of all defendants on November 20,

1988 by correspondence to counsel. Ten days later, the Bossleys moved to non-suit their claims against MHMR. By their nonsuit, the Bossleys hoped to preserve their claims against Drs. Kamphaus and Urschel and the individual employees (except Angela Jones) which the Bossleys believed, unlike their claims against MHMR, would not be subject to the Texas Tort Claims Act damage recovery limitations. The Bossleys elected to gamble for maximum liability exposure.

In Texas, there are three principal defenses in a Texas Tort Claims Act case. There are the traditional defenses of sovereign immunity which the governmental unit can claim, and official immunity which may be claimed by the employee. The third defenses, that of the § 101.106 bar arises when the claimant chooses to sue both the employees and the governmental unit.

Analysis of whether sovereign immunity has been waived requires analysis of whether the personal injury or death was "caused by a condition or use of tangible personal or real property." Tex. Civ. Prac. & Rem. Code § 101.021. Since a governmental unit like MHMR can act only through its employees, the claimant must plead that the conduct of governmental unit employees waived sovereign immunity. Here, the Bossleys focus their case entirely on the inside door lock of the Hillside Center.

The Bossleys then *assume* that the analysis under § 101.021 limits the scope of immunity under § 101.106. However, as the Texas Supreme Court held, the language in § 101.106 is much broader and is intended to provide immunity to all employees of the governmental unit so long as the cause of action against the employees

involves "the same subject matter" as the claimants' claim against the governmental unit. As previously discussed, there are valid reasons for providing broad grants of immunity, none of which the Bossleys even bother to discuss, much less challenge.

As a matter of law, the Bossleys' claims do not amount to a facially valid due process challenge. But even more telling, the Bossleys' contentions are factually incorrect. Their petition leaves the false impression that the liability of every employee but Angela Jones was predicated on something unrelated to the locking of the doors to the Hillside Facility. The Bossleys' live pleadings at trial tell a very different picture. Against Drs. Kamphaus and Urschel, the Bossleys allege that these physicians were negligent in failing to "specifically order that the outer and inner door to Hillside Center remain in a locked 'condition' until Roger was transferred to the Mental Diagnostic Center." App. 5-7. This allegation was intended to trigger a waiver of sovereign immunity under § 101.021. The emphasis and language utilized is hardly "coincidental."

The basic issue is the claimants' ability to define the scope of immunity under § 101.106 by simply pleading that the acts of one employee waived sovereign immunity and only that one employee can claim § 101.106 as a defense.

This is simply a matter of state law which involves no constitutional issues and in which the Bossleys are simply wrong. But even if there were a constitutional issue, this case would not be the case to grant review since the Bossleys' own pleadings contradict their contention. They

pled acts and omissions on the part of all twelve employees, which would constitute waivers of sovereign immunity.

CONCLUSION

For the reasons stated above, Drs. Kamphaus and Urschel request that this Court deny the Bossleys' petition for writ of certiorari.

Date October 23, 1998

Respectfully submitted,

MICHAEL W. EADY
BROWN MCCARROLL & OAKS
HARTLINE, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701
(512) 472-5456
(512) 479-1101 – Telecopy

Counsel for Respondents,
John Kamphaus, M.D. and
Harold Urschel, M.D.

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NO. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D., DORA POGUE, R.N., ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA and PATRICIA PRINCE,	§	DALLAS COUNTY, TEXAS
Defendants.	§	191ST JUDICIAL DISTRICT

PLAINTIFFS' THIRD AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Albert Bossley, Individually, Elaine Bossley, Individually and as Representatives of the Estate of Roger Arthur Bossley, deceased, ("Plaintiffs") complaining of Dallas County Mental Health and Mental Retardation, Angela Jones, John Kamphaus, M.D., Harold Urschel, M.D., Dora Pogue, R.N., Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince, ("Defendants"), and

for cause of action would respectively show the Court the following:

1.00 PARTIES

Plaintiffs Albert and Elaine Bossley are individuals residing in Dallas County, Texas. Defendant Dallas County Mental Health and Mental Retardation is a governmental entity which has been served and has answered herein. Defendant Angela Jones is an individual who has been served and has answered herein. Defendant John Kamphaus, M.D. is an individual who has been served and has answered herein. Defendant Harold Urschel, M.D. is an individual who has been served and has answered herein. Defendant Dora Pogue is an individual who has been served and has answered herein. Defendants Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince are all individuals who have been served with process and have answered herein.

2.00 JURISDICTION

Prior to the filing of this lawsuit and within six (6) months of the date of the occurrence of the negligent acts described herein, Plaintiffs presented to Defendants Dallas County Mental Health and Mental Retardation and Angela Jones notice of the claims against them as prescribed by the Texas Tort Claims. Defendants John Kamphaus and Harold Urschel have each received proper notice pursuant to Texas Revised Civil Statutes, Article 4590i, § 4.01(a). Proper notice has previously been given to the employer of Dora Pogue, Robbie Pugh, Laura

Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince. This action is brought under the Texas Tort Claims Act, Texas Wrongful Death Statute and the Texas Survival Statute. Plaintiffs' damages exceed the minimum jurisdictional requirements of this Court.

3.00 FACTS

In August, 1988, Roger Arthur Bossley was a deeply troubled young man in desperate need of competent medical care. He was suffering from the mental disease of major depression and had made an unsuccessful suicide attempt on July 12, 1988. Roger's major depression had been preceded by a number of employment and social setbacks. Following the unsuccessful suicide attempt, Roger had been taken to Parkland Hospital, transferred to Mental Diagnostic Center and eventually transferred to Hillside Center on July 25, 1988.

Roger Bossley's condition appeared to improve until August 9, 1988 when he was sent to the Texas Rehabilitation Commission by employees of Dallas County Mental Health and Mental Retardation. The rehabilitation counselor, apparently unaware of Roger Bossley's recent suicide attempt, laughed at and ridiculed Roger and his employment history. When Roger returned to Hillside Center, he asked another patient where he could get a gun so he kill himself when he got out of Hillside Center. After these statements were communicated to Dr. Urschel on August 9, 1988, Dr. Urschel wrote in Roger's chart that he considered Roger to still be "a definite risk to himself" and that he would allow Dr. Kamphaus to see Roger

Bossley for possible modification to Terrell State Hospital. However, no suicide precautions or elopement precautions were ordered and Roger was allowed to remain at the open Hillside facility.

When Dr. Kamphaus next visited the Hillside facility on August 11, 1988, he initially granted Roger Bossley a weekend pass with an order written at 2:10 p.m. This order was later revoked at 4:20 p.m. An order was then given to transfer Roger Bossley back to the Mental Diagnostic Center under protective custody. In the transfer documents, Dr. Kamphaus swore under oath that Roger Bossley "has remained suicidal despite lengthy hospitalization here" and that "I am further of the opinion that the Patient presents a substantial risk of serious harm to self of [sic] others if not immediately restrained, the detailed basis for this opinon [sic] being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization."

At this point, Dr. Kamphaus was aware that Roger had extreme anxieties about Terrell State Hospital and did not want to go to Terrell. Despite Roger Bossley's known Major Depression, his known suicidal condition, his fears of being transferred to Terrell State Hospital and his statement two days earlier that he intended to kill himself, Dr. Kamphaus did not order any suicide precautions, elopement precautions, seclusion prior to transfer or request an immediate transfer out of Hillside Center to the Mental Diagnostic Center.

On the morning of August 12, 1988, employees of Hillside Center had a staff meeting and discussed that Roger Bossley was suicidal and an elopement risk

because he had such extreme fears about being transferred to Terrell State Hospital. At some point during the day Dora Pogue wrote into Roger Bossley's chart that "Client has been restricted to the unit, the entrance door to AITC locked. . . . Client carefully monitored in the day area within sight of staff at all times." At approximately 11:23 a.m. on August 12, 1988, Roger Bossley was left completely unattended near the front door of Hillside Center. The inner self-locking door, usually closed for the protection of patients considered to be suicidal, elopement risks, or who were to be transferred back to MDC, had been left open.

At approximately 11:23 a.m., Angela Jones, a female technician at Hillside Center, returned from group therapy, retrieved her purse from the nurses station and unlocked and opened the front door. Immediately prior to unlocking and opening the front door, Angela Jones did not check Roger Bossley's location and did not ensure that some one was carefully monitoring Roger within their sight at all times. As Angela Jones opened the unlocked door, Roger Bossley predictably ran through the open door and down to Interstate 30, approximately one half mile away. No male staff technicians were present to immediately pursue and restrain Roger.

Eventually staff members did pursue and catch up to Roger when he was already on the highway. MHMR employees through their actions then forced Roger in his known suicidal condition to decide between being transferred back to the Mental Diagnostic Center and Terrell State Hospital, or killing himself by jumping in front of highway traffic. Roger, mentally ill and literally "scared

to death" of Terrell, chose the later course and was killed when he jumped in front of a truck.

4.00 CAUSES OF ACTION

The death of Roger Arthur Bossley and Plaintiffs' resulting damages were proximately caused by the negligence of Defendants. **Dr. Urschel** violated the duty owed to plaintiffs to exercise the ordinary care and diligence exercised by other mental health care professionals in the same or similar circumstances. Specifically, Dr. Urschel negligently failed to:

(1) Timely communicate Roger Bossley's condition to Dr. Kamphaus on August 9, 1988 so an immediate decision could be made to transfer Roger Bossley to the Mental Diagnostic Center;

(2) order suicide precautions, elopement precautions and/or place Roger Bossley in seclusion on August 9, 1988 until he could be transferred to the Mental Diagnostic Center;

(3) specifically order that the outer and inner door to Hillside Center remain in a locked "condition" until Roger was transferred to the Mental Diagnostic Center;

(4) specifically order that the seclusion room be "used" to restrain Roger until he could be transferred back to the Mental Diagnostic Center; and

(5) order the transfer of Roger Bossley on August 9, 1988 to the Mental Diagnostic Center;

Dr. Kamphaus violated the duty owed to plaintiffs to exercise the ordinary care and diligence exercised by

other mental health care professionals in the same or similar circumstances. Specifically, Dr. Kamphaus negligently failed to:

(1) order suicide precautions, elopement precautions and/or place Roger Bossley in seclusion on August 9, 1988 until he could be transferred to the Mental Diagnostic Center;

(2) specifically order that the outer and inner doors to Hillside remain in a locked "condition" until Roger was transferred to the Mental Diagnostic Center; and

(3) specifically order that the seclusion room be "used" to restrain Roger until he could be transferred back to the Mental Diagnostic Center.

Defendant staff employees of Dallas County Mental Health and Mental Retardation Center violated the duty owned to plaintiffs to exercise the ordinary care and diligence exercised by other mental health care professionals in the same or similar circumstances. Specifically, the staff employees negligently failed to:

(1) Adequately communicate Roger Bossley's suicidal condition and elopement risk to other staff members;

(2) communicate Roger Bossley's mental condition and history to the Texas Rehabilitation Commission;

(3) order suicide precautions and elopement precautions for Roger Bossley after they knew or should have known that he was suicidal and an elopement risk;

(4) keep the inner self-locking door locked while Roger was awaiting transfer to the Mental Diagnostic Center;

(5) have a male technician monitor Roger Bossley within their sight at all times while Roger was awaiting transfer to the Mental Diagnostic Center;

(6) have any technician monitor Roger Bossley within their sight at all times while Roger was awaiting transfer to the Mental Diagnostic Center;

(7) have any staff member monitor Roger Bossley within their sight at all times while Roger was awaiting transfer to the Mental Diagnostic Center;

Defendant Angela Jones negligently opened the front door to the facility without checking Roger Bossley's position or ensuring that the inner self-locking door was closed and locked, thereby giving Roger Bossley an opportunity to escape the facility in his suicidal condition. The door was opened at a time when Angela Jones knew or should have known that Roger Bossley had access to the doorway and when Angela Jones knew or should have known that no one was carefully monitoring Roger within their sight at all times. Further, the door was opened at a time when it was known that Roger Bossley was suicidal and an elopement risk and after the order had apparently been given to lock the door.

The death of Roger Arthur Bossley and Plaintiffs' resulting damages were proximately caused by a condition or use of tangible personal or real property. The "condition or use or tangible personal or real property" includes, but is not limited to the following:

(1) an employee or agent of Dallas County Mental Health and Mental Retardation Center negligently "using" property by unlocking and opening a door to the

facility, thereby giving Roger Arthur Bossley an opportunity to escape the facility in his suicidal condition;

(2) an employee or agent of Dallas County Mental Health and Mental Retardation Center negligently failing to use the seclusion room to restrain Roger until he could be safely transferred to the Mental Diagnostic Center; and

(3) the inner, self-locking door to the facility was in a defectively open "condition", thereby giving Roger an opportunity to escape the facility.

At all times material hereto, all of the agents, servants and employees for Dallas County Mental Health and Mental Retardation Center who were in any way connected with the occurrence in suit, were acting within the course and scope of their employment and in furtherance of the duties which were not uniquely governmental.

5.00 DAMAGES

The negligence of Defendants proximately caused the following damages to Albert and Elaine Bossley and the Estate of Roger Arthur Bossley:

(1) Past and future mental anguish;

(2) past and future loss of companionship and society;

(3) funeral expenses for Roger Arthur Bossley.

WHEREFORE, Plaintiffs request that Defendants be cited to appear and answer herein and on final trial hereof Plaintiffs have judgment against Defendant for

damages as plead herein in excess of the minimum jurisdiction limits of this Court, prejudgment and postjudgment interest at the highest legal rate and from the proper legal dates, costs of suit and such other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
State Bar Number 15154300
2435 N. Central Expy., Suite 900
Richardson, Texas 75080

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been mailed certified mail, return receipt requested, to all counsel of record on this 8th day of November, 1990.

/s/ Robert G. Oake, Jr.
Robert G. Oake, jr.

NO. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED, Plaintiffs, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D., DORA POGUE, R.N., ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA and PATRICIA PRINCE, Defendants.	§	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 191ST JUDICIAL DISTRICT

PLAINTIFFS' RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT OF MHMR NON-PHYSICIAN EMPLOYEES

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Albert Bossley, Individually, Elaine Bossley, Individually and as Representatives of the Estate of Roger Arthur Bossley, deceased, ("Plaintiffs") and file this Response to the Motion for Summary Judgment of Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley,

Florence Bates, Danny Williams, Domingo Davila and Patricia Prince ("MHMR employees"), respectfully showing as follows:

I.

There are genuine issues of material fact that preclude the granting of summary judgment in favor of MHMR employees, as appear from the pleadings, the referenced depositions, the interrogatory answers and the Court's record, all of which are incorporated by reference herein. More particularly:

(1) A genuine issue of material fact exists as to whether MHMR employees were negligent in their care and treatment of Roger Bossley since none of the MHMR employees are entitled to official immunity.

(2) Alternatively, a genuine issue of material fact exists as to whether MHMR employees are entitled to official immunity.

(3) A genuine issue of material fact exists as to whether MHMR employees were negligent in their care and treatment of Roger Bossley since none of the MHMR employees are entitled to governmental immunity.

(4) Alternatively, a genuine issue of material fact exists as to whether MHMR employees are entitled to governmental immunity.

(5) Alternatively, a genuine issue of material fact exists as to whether MHMR employees were negligent in their care and treatment of Roger Bossley because the alleged negligent acts of the MHMR employees involved the "use" and "condition" of property.

(6) Alternatively, a genuine issue of material fact exists as to whether the alleged negligent acts of the MHMR employees involved a "conditon" or "use" of property.

(7) A genuine issue of material fact exists as to whether the negligence of MHMR employees proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

(8) A genuine issue of material fact exists as to the amount of damages to be assessed against MHMR employees in excess of $100,000.00 because none of the MHMR employees are entitled to a statutory cap on damages.

II.

NOTICE OF INTENT TO USE NON-FILED, SPECIFIED DISCOVERY AS SUMMARY JUDGMENT PROOF

Pursuant to Texas Rule of Civil Procedure 166a(d), Plaintiffs hereby give notice that they intend to use the following specified discovery products not on file with the clerk as summary judgment evidence:

(1) Videotaped Deposition of John Kamphaus, M.D.;

(2) Videotaped Deposition of Harold Urschel, M.D.;

(3) Videotaped Deposition of Dora Pogue;

(4) Videotaped Deposition of Angela Jones;

(5) Videotaped Deposition of Robbie Pugh;

(6) Videotaped Deposition of Nettie Langley;

(7) Videotaped Deposition of Danny Williams;

(8) Videotaped Deposition of Laura Moore;

(9) Videotaped Deposition of Domingo Davila;

(10) Videotaped Deposition of Joyce Johnson;

(11) Videotaped Deposition of Patricia Prince;

(12) Videotaped Deposition of Florence Bates;

(13) Deposition of Elaine Bossley;

(14) Deposition of Albert Bossley;

(15) Deposition of Carol Bossley;

(16) Deposition of Donene Disco; and

(17) Deposition of Deanna Dean.

WHEREFORE, Plaintiff requests that this Court deny all Defendant MHMR employees their Motion for Summary Judgment.

Respectfully submitted,

The Law Offices Of
Robert G. Oake, Jr.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Bar Card No. 15154300
2435 N. Central Expy., Suite 900
Richardson, Texas 75080
(214) 437-6000

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been mailed certified mail, return receipt requested, to all counsel of record on this 8th day of November, 1990.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

NO. 89-3922-J

ALBERT BOSSLEY, et al	)	IN THE DISTRICT
VS.	)	COURT
	)	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	)	DALLAS COUNTY, TEXAS
	)	191ST JUDICIAL
	)	DISTRICT

****

ORAL DEPOSITION
OF JOHN KAMPHAUS, M.D.

****

ANSWERS AND ORAL DEPOSITION OF JOHN KAMPHAUS, M.D., a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 18th day of April, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Brown Maroney & Oakes Hartline, located at 3012 Fairmount, Dallas, Texas 75201.

* * *

[p. 189] Whether that information had been disseminated to the staff?

A. I'm not aware, although the information is in the progress note, which is certainly a common form of dissemination of information.

Q. Okay. But you cannot be assured that all the staff members will read that, can you?

A. No.

Q. Should that information have been disseminated to the staff on the 10th and the 11th?

A. I don't know that it wasn't.

Q. If it wasn't, should it have been?

A. I would think so.

Q. And would you have been concerned if say on the 10th, Roger had decided to just walk off the grounds of the property and gone somewhere?

A. Yes.

Q. Why?

A. Because at that point, he had made this statement, allegedly, although I don't know this, to another patient, that he might attempt to kill himself after leaving the hospital.

Q. Okay. What precautions were put into place to ensure that Roger would not walk off the facility and go somewhere and kill himself?

* * *

[p. 193] state hospital," and you know, snake pit kind of mentality, but he did not express to me any sort of anxieties about homosexual issues.

Q. Okay. Did you understand from other people such as Patty Prince that Roger had a fear of going to Terrell?

A. I knew that he had a fear of going to Terrell. He expressed that to me openly.

Q. Would you describe that as high anxiety of going to Terrell?

A. I mean, he seemed to have some misgivings about going there. I think that's a common reaction when people find out they're going to the state hospital. Most people have fantasies about the state hospital. In general, they are not pleasant fantasies about the state hospital.

Q. All right. Let's now go to your note on August 11, if we could, 1988?

A. All right.

Q. Could you read that note for us, please?

A. "I had been informed regarding the patient reportedly telling another client on the 9th that he intends to kill himself after leaving here. When confronted about this, the patient looked surprised but did not deny saying this. He also reportedly told his

* * *

[p. 209] contradictory information there. On the one hand, he had supposedly told someone he was going to kill himself. On the other hand, he had said nothing is worth dying for, but at that point, I was really like Dr. Morton, when Roger was at Parkland.

It seemed to me that the degree of rapport, the degree of contact that we had, the alliance that we had was not a very good one.

He was a difficult person to reach out to, contact, work with. He struck me then and still does now as being passive/aggressive.

He was very angry, I think, underneath that calm exterior, and I didn't know what it was that he was going to do, but I didn't feel comfortable under the circumstances with letting him leave the hospital.

Q. Okay.

A. If he had said to me, "I'm not going to hurt myself, you know, I didn't make the statement to this patient," then maybe I might have reconsidered the situation, but he really didn't do that.

Q. Did you feel at that time that Roger was at risk for harming himself?

A. I think he was at risk for harming himself if he had left the hospital, if he had been discharged.

Q. At that point in time, what steps did you take

* * *

[p. 206] A. Yes.

Q. Don't you think that might have – well, you knew at the time that Roger didn't want to go to Terrell, didn't you?

A. Well, after I talked with him about the option of going to Terrell, he made it very clear to me that he didn't want to go.

Q. That he did not want to go?

A. Yes, he did not want to go.

Q. Wouldn't that make it foreseeable under those conditions that Roger would try to leave the facility?

A. Not necessarily. People tell me that all the time, that they don't want to go to Terrell, and they don't always try to elope.

Q. But if a person, but if Roger is telling you that he doesn't want to go to Terrell State Hospital, don't you then have a duty to make sure that Roger doesn't try another alternative, in other words, escape the facility, elope?

A. Well, I think it depends on the degree to which you think it's likely that he's going to elope. I didn't think there was a high likelihood of that, given his past behavior at Hillside and given things that he was saying to me at that point in time.

Q. At that point in time on the 11th, did you

* * *

Form 614 – Motion for Modification of Order for In-Patient Mental Health Services to a More Restrictive Environment.

NO. 88-2086

THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF R.B.	IN THE PROBATE COURT DALLAS COUNTY, TEXAS

MOTION FOR MODIFICATION OF ORDER FOR IN-PATIENT MENTAL HEALTH SERVICES TO A MORE RESTRICTIVE ENVIRONMENT

To Said Honorable Court:

John Kamphaus, MD, the Movant herein, is the head of A.I.T.C. (Hillside Center), a mental health facility in (Name of facility) Dallas County, Texas. Movant respectfully shows the Court that whereas Roger Bossley (name of Patient) was committed to the A.I.T.C. (Hillside Center) for (Name of facility) in-patient mental health services by order issued on the 21st day of July, 1988 in the above entitled and numbered cause, in-patient mental health services are no longer appropriate for said patient, and the Order for In-Patient Mental Health Services should be modified to provide for in-patient mental health services in a more restrictive environment pursuant to Article 5547-54 V.A.C.S. Modification of the Order for In-Patient Mental

Health Services is appropriate because: (Explain in detail why Modification is being requested)

Patient remains suicidal and needs further evaluation and treatment.

It is there requested that the Order of Bill Bedard committing Roger Bossley (name of Patient) to In-Patient care at A.I.T.C. (Hillside Center) (name of facility) be modified to an Order for In-Patient Mental Health Service to a More Restrictive Environment (which may include an Order of Protective Custody to the Mental Diagnostic Center with the recommended treatment facility being Terrell State H and that the Court issue further and additional orders as may be proper.

/s/ John Kamphaus, MD
(Head of Facility)

8/11/88
(Date)

NO. _____

MOTION FOR MODIFICATION OF ORDER FOR
IN-PATIENT MENTAL HEALTH SERVICES
TO A MORE RESTRICTIVE ENVIRONMENT

_____

_____

_____

AS A MENTALLY ILL PERSON

_____

_____

_____

Form 639 – Order of Protective Custody.

NO. 88-2086MI

THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF ROGER BOSSLEY	)(	IN THE PROBATE COURT DALLAS COUNTY, TEXAS

ORDER OF PROTECTIVE CUSTODY

TO: /s/ Dallas County Sheriff's Dept. (Peace Officer) OR TO: _____ (Designated Person)

WHEREAS, an Application for Court-Ordered Mental Health Services for Roger Bossley, hereinafter called "Proposed Patient", is pending above referenced Court, and there also having been filed a Physician's Certificate of Medical Examination for Mental Illness showing that the Proposed Patient has been examined within five days:

AND WHEREAS, the Court has considered said Application and Physician's Certification and has determined that the conclusions and beliefs of the applicant and certifying physician are adequately supported by the information presented:

AND WHEREAS, the Court has hereby determined that the certifying physician has stated his opinion, and its detailed basis, that the Proposed Patient is mentally ill; and has further determined that said Proposed Patient presents a substantial risk of serious harm to self or

others if not immediately restrained pending a hearing on probable cause:

NOW THEREFORE, you are hereby ORDERED to take the person of the Proposed Patient into Protective Custody and immediately transport such person to: Mental Diagnostic Center , where said Proposed Patient is to be detained according to law, pending a Probable Cause Hearing or upon further Order of the Court.

HEREIN FAIL NOT, but of this Order make due return to said Court showing how you have executed same.

GIVEN UNDER MY HAND this the 12th day of August 1988

/s/ Illegible
JUDGE PRESIDING
Special Judge Sitting for
Judge of Probate Court No. 3

Recieved at _____,
this the _____ day of _____, 19__.

NO. 88-2086 MI

THE STATE OF TEXAS FOR THE BEST INTEREST
AND PROTECTION OF

Roger Bossley
AS A MENTALLY ILL PERSON
W/M/26

ORDER OF PROTECTIVE CUSTODY

TO: MDC at PMH 5123 Harry Hines Dallas

FROM: Hillside Center – AITC
1353 N. Westmoreland
Dallas
BED 18

Form 633-Physician's Certificate of Medical Examination for Mental Illness.

No. 88-2086

THE STATE OF TEXAS][
FOR THE BEST INTEREST][
AND PROTECTION OF][

R.B.

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION FOR MENTAL ILLNESS

I, the undersigned, a person licensed to practice medicine in the State of Texas, or person employed by an agency of the United States having a license to practice medicine in any state of the United States, do hereby certify to wit:

1. That my name and address is John Kamphaus, M.D., Hillside Center, Dallas TX

2. That on the 11th day of August, 1988, at the following location: Hillside Center, I evaluated and examined Roger Bossley, hereafter called "Patient."

3. The Patient, whose address is 521 Kingston, Grand Prairie TX has been under my care for the following, if any period of time: 18 days.

4. A brief diagnosis of the physical and mental condition of the Patient on said date is: Major depression

5. An accurate description of the mental health treatment, if any, given by me or administered under my direction is as follows: medicate illegible, and group/independent therapy.

6. That I am of the opinion that the Patient is mentally ill, and that as a result of that illness the Patient is likely to cause serious harm to self or others, or both self and others, or will, if not treated continue to suffer severe and abnormal mental, emotional, or physical distress and will continue to experience deterioration of his ability to function independently and is unable to make a rational and informed decision as to whether or not to submit to treatment; and the detailed basis for this opinion is as follows: The patient remains depressed and periodically suicidal.

7. (NOTE; COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF A MOTION FOR AN OPC.)

That I am further of the opinion that the Patient presents a substantial risk of serious harm to self or others if not immediately restrained, the detailed basis for this opinion being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization.

8. (NOTE; COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF COURT-ORDERED EXTENDED MENTAL HEALTH SERVICES OR A RENEWAL OF SAME.)

That I am additionally of the opinion that the Patient's condition, as set out in item 6 above, is expected to continue for more than 90 days, the detailed basis for this opinion being: The patient has remained suicidal despite lengthy hospitalization here.

Signed and Dated this the 11th day of August, 1988.

/s/ John Kamphaus, M.D.
Examining Physician

Sworn to and subscribed before me, this the 11th day of August 1988.

/s/ Diane Harris
Notary Public, Dallas County, Texas

THE STATE OF TEXAS
COUNTY OF DALLAS

ESTATE OF: Roger Bossley CAUSE NO. 88-2086 MI

CERTIFICATE

I, EARL BULLOCK, COUNTY CLERK OF DALLAS COUNTY AND CLERK OF THE COUNTY COURTS AND PROBATE COURTS within and for the COUNTY OF DALLAS, STATE OF TEXAS, do hereby CERTIFY and that the following is a TRUE AND CORRECT copy of:

1. Motion For Modification Of Order For In-Patient Mental Health Services To A More Restrictive Environment

2. Order Of Protective Custody

3. Physician's Certificate Of Medical Examination For Mental Illness

The Same Appear In the Original Now on File and of Record In The PROBATE COURTS OF DALLAS COUNTY, TEXAS.

Given Under My Hand and Seal of Office, THIS THE 12th DAY OF February 19

(SEAL)

/s/ Earline D. Jemison
JACQUELINE M. DUNSON
Deputy
Earline D. Jemison

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
VS.	(	DISTRICT COURT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(((((	DALLAS COUNTY, TEXAS 191ST JUDICIAL DISTRICT

****

ORAL DEPOSITION
OF
HAROLD URSCHEL, M. D.

****

ANSWERS AND ORAL DEPOSITION OF HAROLD URSCHEL, M. D., a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 8th day of May, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Brown Maroney & Oaks Hartline, located at 3012 Fairmount, Dallas, Texas 75201.

* * *

[p. 132] talking about the reasons you would put someone on suicidal precautions. Do you want to go back over those again? The same sort of factors apply. I mean, this is purely a decision on whether they go on suicidal precautions. If you like to, we can.

Q. I don't think that's necessary.

A. Okay.

Q. All right, sir. You indicate, "I feel patient is still a definite risk to himself." And of course, you don't indicate whether you feel he's a definite risk to himself inside the facility of outside the facility, do you?

A. Right.

Q. Did you consider putting Roger on suicide precautions at this point?

A. Yes.

Q. Did you review that decision with anyone?

A. No. Whenever a patient mentions the word "suicide," there is always, there isn't always an assessment in my mind of whether this patient needs to be on suicide precautions or not.

Q. If Roger at this point had indicated to you that he wanted to leave the facility, would you have allowed him to?

A. No.

[p. 133] Q. Why not?

A. Because I don't know, I really don't know what's going on with him completely, and so I don't feel comfortable with him going outside, especially in light of some of the information I'm getting.

Q. What steps did you take to ensure that Roger would not leave the facility?

A. None.

Q. Why not?

A. He showed no reason. He had just been on a weekend pass. He didn't have any intention of the leaving the facility, as far as I was concerned. He had free roam of the facility. He could have left, you know, I probably got there in the evening, he could have left at 6:00. He was still there.

Q. Well, of course the TRC meeting was after the weekend pass, wasn't it?

A. Right. And between the TRC meeting and when I saw him, he could have left if he wanted to. He didn't. He was still there, so I didn't see any real need. I mean, he was here. His family was here. If you remember, he has a lot of support systems out there, girlfriend that cares about him, his family cares about him.

They're up here trying to help him. I have no idea,

* * *

[p. 139] facility so they won't have to go to Terrell?

A. Well, we didn't talk about Terrell this night. This was never brought up this night. This was not brought up until Dr. Kamphaus saw him. When I talked to Roger about Terrell was back at MDC, when I said, "I felt you needed to go to Terrell because they have longer stabilization period, and you won't, you know, I'm so concerned about your safety." So this was never brought up.

Q. I understand that. I mean, hypothetically speaking –

MR. MARONEY: Pardon me. Are you through?

THE WITNESS: Yes.

Q. (By Mr. Oake) Hypothetically speaking, if Roger had been told about Terrell, he was scared of it, you knew he was scared of it and you knew he didn't want to go to Terrell, if you knew that on the 9th, if you knew he was a definite risk to himself and he had voiced the intention to kill himself, at that point, wouldn't it be foreseeable that Roger would be an elopement risk?

A. Yes. There's a chance that he might be an elopement risk.

Q. And wouldn't that be a reason to put Roger on elopement precautions?

A. That's a possibility.

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
VS.	(	DISTRICT COURT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(	DALLAS COUNTY, TEXAS
	(	191ST JUDICIAL DISTRICT

****

VIDEOTAPED DEPOSITION
OF
ANGELA JONES

****

ANSWERS AND ORAL DEPOSITION OF ANGELA JONES, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 15th day of June, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 48] locked?

A. No.

Q. When a patient –

A. I'm sorry.

Q. Is being transferred back to MDC?

A. No, because number one, they may not tell that client that day, or they may be trying to make other

decisions about that client, so no, it's not always locked, no.

Q. Whenever the order of protective custody papers have been signed by the doctor –

A. Uh-huh.

Q. And they're being taken over to the mental health court –

A. Uh-huh.

Q. Is the front door then always locked?

A. Yes.

Q. Why?

A. In order to make sure that that client remains there until they're being picked up by MDC or whoever is going to pick them up, the sheriff or whoever.

Q. When a client – when the orders for the order of protective custody is given and taken over to the mental health court, is the staff given any other instructions concerning how to act or where the client is [p. 49] allowed to go?

A. Yes.

Q. What are those orders?

A. The staff is alerted that that client may be going back to MDC. They also alert us if that client, if they have already told that client that they're going to be transferred back, that the client may state that, "Well, I don't want to go back."

They're aware of that this client may try to leave, so maybe, you know, we should protect him, to lock the front door, or if they feel like that client is going to run out in the street or something to harm themselves, they tell us to, "Hey, lock the front door."

Q. Well, okay. Are you telling me that sometimes the front door is not locked?

A. Right, because it is an open unit, and when it's an open unit, those clients are free to sit outside or go in and out as they please, because this is an open unit. MDC is a closed unit, because they're more combative and they're not really stabilized on their medication, that's why.

But Hillside is an open unit, and it's supposed to be for the clients that are stabilized on their medicine or they're getting better and dealing with their problems or trying to work out their problems.

* * *

[p. 55] another locked door?

A. At MDC?

Q. Yes.

A. I don't really recall. I don't really recall.

Q. Are you familiar with Terrell State Hospital?

A. No, I'm not.

Q. Have you ever worked at any other locked facility that handled suicidal patients?

A. No.

Q. Were you aware Friday morning that if Roger Bossley were allowed to go outside the facility that there was a potential for him harming himself?

A. Yes.

Q. Would you agree with me that the most important responsibility you had Friday morning of August 12, 1988 was to keep Roger Bossley inside of the facility?

A. Yes.

Q. Before August 12, 1988, can you give me any approximate number of times that you had been in that situation that a patient was going to be transferred to MDC, the front door was locked and you were responsible for keeping the patient inside the facility?

A. I can't recall.

Q. Had it happened before?

A. Had what happened before?

[p. 1] NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
	(	DISTRICT COURT
VS.	(	
	(	DALLAS COUNTY,
DALLAS COUNTY	(	TEXAS
MENTAL HEALTH AND	(	
MENTAL RETARDATION,	(	191ST JUDICIAL
et al	(	DISTRICT

****

VIDEOTAPED DEPOSITION
OF
DANNY WILLIAMS

****

ANSWERS AND ORAL DEPOSITION OF DANNY WILLIAMS, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 11th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 65] Q. "G" is, "The assigned therapy/technician shall note the location and activity of the client every 15 minutes, and more often if necessary. Fifteen minute checks are documented on the close observation record." Do you know if that was done?

A. I don't know.

Q. The morning of August 12, 1988, were you aware that Roger Bossley had a great fear of going to Terrell, of being transferred to Terrell?

A. Yes.

Q. How were you aware of that?

A. Because he was different, I mean, he was just sort of different.

MR. BARNES: He was what? I didn't hear you.

THE WITNESS: He was different. He was different in his actions. He was quiet and to himself and, you know, just kind of isolative.

Q. (By Mr. Oake) Did you ever talk with Roger during his stay at Hillside?

A. Brief moments about, you know, so many minutes a day, per day, when I did see him. I didn't know him that well.

Q. Did he ever personally communicate to you, in any way, that he did not want to go to Terrell?

[p. 66] A. No.

Q. Was it discussed during the shift change report meeting Friday morning that Roger had a great fear of going to Terrell and did not want to go?

A. True. I believe so, uh-huh.

Q. And was it also discussed that because of his great fear of Terrell, he was going to try to escape the unit so he wouldn't have to be transferred?

A. True.

MR. PENNINGTON: I'm sorry. What?

MR. OAKE: He was going to try to –

MR. BARNES: You actually heard that?

THE WITNESS: Yes.

MR. OAKE: He was going to escape the unit.

THE WITNESS: From –

MR. BARNES: From who?

THE WITNESS: From the staff at report.

MR. BARNES: At the time?

THE WITNESS: Uh-huh.

Q. (By Mr. Oake) Florence Bates?

A. Uh-huh, true.

MR. BARNES: Okay.

Q. (By Mr. Oake) Was Robbie Pugh there during the staff shift meeting?

A. Yes, she was.

[p. 1] NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
VS.	(	DISTRICT COURT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(	DALLAS COUNTY, TEXAS
	(	191ST JUDICIAL DISTRICT

****

VIDEOTAPED DEPOSITION
OF
FLORENCE BATES

****

ANSWERS AND ORAL DEPOSITION OF FLORENCE BATES, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 12th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 58] A. I don't make diagnoses.

Q. Are you familiar with major, the diagnosis of major depression?

A. Right.

Q. Or major depressive disorder?

A. Uh-huh.

Q. You have to say "yes."

A. Yes.

Q. And in connection with your nurses training for psychological or psychiatric wards, have you worked in the past with patients that are suffering from major depression?

A. Right.

Q. Are you aware that major depression is considered to be a mental illness?

A. Right.

Q. And are you aware that one of the symptoms of the illness of major depression is considered to be suicide?

A. Right.

Q. All right. Are you aware that a person that is suffering from major depression and that is considered to be suicidal can be irrational?

A. Yes.

Q. And unpredictable?

A. Right.

[p. 59] Q. And as a nurse in a psychological ward, that is something that you're trained to know about and to watch for, that a patient that is suffering from major depression can be irrational, can be illogical, can be unpredictable, correct?

A. Right.

Q. Correct?

A. Right.

Q. In other words, that patient may at one moment appear to be hitchhiking down the road, and at the next moment, that patient may irrationally decide to jump in front of a vehicle, correct?

A. Possibility.

MR. OAKE: Pass the witness.

MR. PENNINGTON: No questions.

MR. BARNES: I have no questions.

(Off the record discussion.)

Q. (By Mr. Oake) were you aware on Friday morning, August 12, that Roger had been diagnosed as suffering from major depression?

A. I'm not sure.

Q. Okay. If that would have been in the progress notes and in the chart, would that have been something that you would be aware of?

A. I don't know. What are you saying?

NO. 05-9100284-CV

ALBERT BOSSLEY, et al. Appellants, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al. Appellees.	)	IN THE COURT OF APPEALS FOR THE FIFTH COURT OF APPEALS DISTRICT OF TEXAS

APPELLANTS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

TO THE HONORABLE COURT:

Albert Bossley, Individually, Elaine Bossley, Individually and as representatives of the estate of Roger Arthur Bossley, deceased, Appellants in the above entitled cause, hereby motion the Court for Leave to Supplement the Record pursuant to Tex. R. App. P. 55(b) as follows:

I.

This is an appeal from a summary judgment. In the court below, plaintiffs gave proper notice that they intended to use, pursuant to Texas Rule of Civil Procedure 166a(d), specified discovery products not on file with the clerk as summary judgment evidence. (See transcript, Vol. I., page 189; Vol. II, page 221; Vol. II, page 253) Included in these lists of depositions were the depositions of Albert Bossley, Elaine Bossley Vol. II, John Kamphaus, M. D. and Harold Urschel, M. D. Since Proper notice was given pursuant to Texas Rule of Civil Procedure 166a(d),

these depositions were properly before the court below and should also be considered by this Court on appeal.

II.

WHEREFORE Plaintiffs pray that this Court permit to be filed the deposition transcripts tendered by plaintiff, or alternatively, that this Court direct the clerk of the trial court to permit to be filed and then certify and transmit to this Court the depositions of Albert Bossley, Elaine Bossley, Vol. II, John Kamphaus, M. D. and Harold Urschel, M. D. to be considered on appeal.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600

ATTORNEY FOR
APPELLANTS

Order issued October 29, 1991

[SEAL]
In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY, ET AL., Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ET AL., Appellees

---

ORDER

BEFORE CHIEF JUSTICE ENOCH AND
JUSTICES LAGARDE AND BURNETT

Appellants' October 8, 1991 motion for leave to supplement the record is **DENIED**. The depositions of Albert Bossley, Elaine Bossley, John Kamphaus, M.D., and Harold Urschel, M.D., tendered to this Court on August 2, 1991, are **STRICKEN**. The Clerk of the Court is directed to return them to counsel for appellants forthwith.

/s/ Joe Burnett
JOE BURNETT
JUSTICE

NO. 05-91-00284-CV

ALBERT BOSSLEY, et al. Appellants, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al. Appellees.	)	IN THE COURT OF APPEALS FOR THE FIFTH COURT OF APPEALS DISTRICT OF TEXAS

APPELLANTS' SECOND MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

TO THE HONORABLE COURT:

Albert Bossley, Individually, Elaine Bossley, Individually and as representatives of the estate of Roger Arthur Bossley, deceased, Appellants in the above entitled cause, hereby motion the Court for Leave to Supplement the Record pursuant to Tex. R. App. P. 55(b) as follows:

I.

This is an appeal from a summary judgment. Appellants request this Court to direct a supplemental record to be certified and transmitted by the clerk of the trial court containing the following materials which are a part of the trial court's file:

1) Deposition Certificate of Deanna Dean Filed 10/2/90

2) Deposition Certificate of Joyce Johnson filed 9/19/90

3) Deposition Certificate of Laura Moore filed 9/19/90

4) Deposition Certificate of Florence Bates filed 9/19/90

5) Deposition Certificate of Nettie Langley filed 9/19/90

6) Deposition Certificate of Robbie Pugh filed 9/19/90

7) Deposition Certificate of Domingo Davila filed 9/19/90

8) Deposition Certificate of Danny Williams filed 9/19/90

9) Deposition Certificate of Donene Disco filed 9/7/90

10) Deposition Certificate of Dora Pogue filed 8/14/90

11) Deposition Certificate of Angela Jones filed 8/14/90

12) Deposition Certificate of Patricia Prince filed 8/14/90

13) Deposition Certificate of Harold Urschel, M.D. file 7/3/90

14) Deposition Certificate of John Kamphaus, M.D. filed 5/31/90

II.

This supplementation will not unreasonably delay disposition of this appeal.

III.

WHEREFORE Plaintiffs pray that this Court direct the clerk of the trial court to certify and transmit to this Court the above listed deposition certificates.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600

ATTORNEY FOR APPELLANTS

Certificate of Delivery

I certify that a true and correct copy of the foregoing Appellants' Motion has been mailed certified mail, return receipt requested, to all counsel of record in this cause on this 15th day of November, 1991.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

Order issued December 19, 1991

(SEAL)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY, ET AL., Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ET AL., Appellees

---

ORDER

On motion of appellants filed November 18, 1991, leave is **GRANTED** to file, within twenty-one days of the date of this order, a supplemental transcript containing only the deposition certificates listed in appellants' November 18, 1991 motion. The Court reserves ruling at this time on the materiality of the items sought to be included in the supplemental transcript.

/s/ Joe Burnett
JOE BURNETT
JUSTICE

NO. 05-91-00284-CV

ALBERT BOSSLEY, et al. Appellants, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al. Appellees.	§ § § § § § § § §	IN THE COURT OF APPEALS FOR THE FIFTH COURT OF APPEALS DISTRICT OF TEXAS

APPELLANTS' THIRD MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

TO THE HONORABLE COURT:

Albert Bossley, Individually, Elaine Bossley, Individually and as representatives of the estate of Roger Arthur Bossley, deceased, Appellants in the above entitled cause, hereby motion the Court for Leave to Supplement the Record pursuant to Tex. R. App. P. 55(b) as follows:

I.

This is an appeal from a summary judgment. Appellants request this Court to direct a supplemental record to be certified and transmitted by the clerk of the trial court containing the following materials which are a part of the trial court's file:

1) Deposition of Danny Williams

2) Deposition of Angela Jones

3) Deposition of Florence Bates

4) Deposition of Harold Urschel, M.D.

5) Deposition of John Kamphaus, M.D.

II.

These depositions were "filed," within the meaning of Texas Rule of Civil Procedure 166a(d), when Plaintiffs/Appellants properly and timely filed their notice of intent to use these discovery products as summary judgment proof. Although Appellees have taken a contrary position, Plaintiffs/Appellants respectfully suggest that Appellees' position would not only render Rule 166a(d) a nullity, it would turn the rule into a trap. The instant case provides a good example.

When Plaintiffs/Appellants were preparing their Responses to the Appellees' Motions for Summary Judgment, it was decided that all depositions should be included as summary judgment proof. This was necessary primarily because Appellees were moving for summary judgment based, in part, on lack of proximate causation. Large and scattered portions of each deposition contain testimony relevant to the issue of proximate causation in this case, particularly why a proximate cause of Roger's death was the negligence of the health care providers and not Roger's father, Roger's family, Roger's upbringing, Roger's work, Roger's religion, etc.

In the past, the undersigned counsel has attached entire depositions to a Summary Judgment Response when the depositions were to be used as summary judgment proof. The undersigned counsel also would have attached all the depositions to the Summary Judgment Response in this case, **except for the provisions of new**

Rule 166a(d). The rule writers, in their wisdom, realized that it would be much more efficient (and a tremendous savings of paper and filing space) if a lawyer could simply refer to discovery products in a notice and file the notice with the court. This is exactly what Rule 166a(d) allows the lawyer to do and this is exactly what the undersigned counsel did. The only possible correct interpretation of Rule 166a(d) is that when the notice is filed, the discovery products referred to in the notice are also filed for trial court and appellate purposes.

How can there be any other proper interpretation? Appellees apparently would have this Court believe that the filing of a notice does not (1) file the documents referred to in the notice for the purposes of the summary judgment hearing and/or (2) file the documents with the trial court to be later transmitted to the appellate court for appellate purposes. Conclusion (1) is directly contrary to the language of Rule 166a(d) itself. Conclusion (2) has two undesirable effects. First, it would render Rule 166a(d) useless. Who would ever take advantage of Rule 166a(d) if the discovery products referred to in the notice could only be used as summary judgment evidence at the trial court level and not on appeal? Second, conclusion (2) would turn Rule 166a(d) into a sort of legal "venus fly trap," openly seducing the lawyer into believing that a simple, efficient and economical method existed of transmitting voluminous proof to the trial court, then snapping shut when the lawyer needed to rely upon such proof on appeal. Surely the rule drafters were not so insidious as to devise such an appellate trap.

In sum, the only proper interpretation of Rule 166a(d) is that discovery products are filed, both for trial

court and appellate purposes, when a proper notice is filed with the trial court in a timely manner. Since Plaintiffs/Appellants properly and timely filed a notice to use the above-listed discovery products, they should be transmitted to this Court for use on appeal.

III.

This supplementation will not unreasonably delay disposition of this appeal.

IV.

WHEREFORE Plaintiffs pray that this Court direct the clerk of the trial court to certify and transmit to this Court the above listed depositions.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600

ATTORNEY FOR APPELLANTS

Certificate of Delivery

I certify that a true and correct copy of the foregoing Appellants' Motion has been mailed certified mail, return receipt requested, to all counsel of record in this cause on this 16th day of March, 1992.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

Order issued March 27, 1992

(SEAL)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY, ET AL., Appellant

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, Appellee

ORDER

Appellants' March 16, 1992 motion for leave to supplement the record is **DENIED**. *Deerfield Land Joint Venture v. Southern Union Realty Company,* 758 S.W.2d 608 (Tex. App. – Dallas 1988, no writ).

/s/ Craig Trively Enoch
CRAIG TRIVELY ENOCH
CHIEF JUSTICE

NO. 05-91-00284-CV

IN THE
COURT OF APPEALS
FOR THE
FIFTH COURT OF APPEALS DISTRICT
OF TEXAS
AT DALLAS

Albert Bossley, et al., Appellants

v.

Dallas County Mental Health and
Mental Retardation, et al., Appellees

Appealed from
The District Court of Dallas County, Texas
191st Judicial District

BRIEF FOR APPELLANTS
Albert Bossley, et al.

Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080

ATTORNEY FOR APPELLANTS

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NAMES AND ADDRESSES OF PARTIES

I certify that the following is a complete list of the names and addresses of all parties to the action:

Plaintiffs: Albert Bossley, 1902 Wellington, Grand Prairie, Texas 75051

Elaine Bossley, 1902 Wellington, Grand Prairie, Texas 75051

Estate of Roger Arthur Bossley, Deceased

Defendants: Dallas County Mental Health and Mental Retardation, 1341 West Mockingbird Lane, Suite 1000E, Dallas, Texas 75247

Angela Jones, 1353 North Westmoreland Avenue, Dallas, Texas 75211

John Kamphaus, M.D., Timberlawn Hospital, 4600 Samuell Blvd., Dallas, Texas.

Harold Urschel, M.D., Wanamaker House, 2020 Walnut Street – Apt. 28L Philadelphia, Pennsylvania 19103.

Dora Pogue, 944 Timber Dell Lane in Dallas, Texas 75232.

Robbie Pugh, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Laura Moore, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Nettie Langley, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Florence Bates, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Danny Williams, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Domingo Davila, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Patricia Prince, 1353 North Westmoreland Avenue, Dallas, Texas 75211

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NO. 05-91-00280-CV

IN THE
COURT OF APPEALS
FOR THE
FIFTH COURT OF APPEALS DISTRICT
OF TEXAS
AT DALLAS

Albert Bossley, et al., Appellants

v.

Dallas County Mental Health and
Mental Retardation, et al., Appellees

BRIEF OF APPELLANTS
Albert Bossley, et al.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

This is an appeal from summary judgments granted in favor of all defendants. Albert Bossley, Individually, Elaine Bossley, Individually and as Representatives of the Estate of Roger Arthur Bossley, deceased, ("Plaintiffs"), commenced this negligence action against Dallas County Mental Health and Mental Retardation ("MHMR"), Angela Jones, John Kamphaus, M.D., Harold Urschel, M.D., Dora Pogue, R.N., Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince, ("Defendants") to recover damages sustained when Roger Bossley was killed following his elopement from the Dallas County Mental Health and Mental Retardation Center. All defendants

moved for summary judgments based on the alleged defenses of official immunity, governmental immunity, lack of proximate causation and a statutory cap on damages. Prior to the summary judgment hearing, Plaintiffs filed a fourth amended original petition which reduced the request for damages against defendant Dallas County Mental Health and Mental Retardation to $100,000.00. The 191st District Court of Dallas County then granted summary judgment in favor of all defendants on all points.

Following the summary judgment hearing, but before the summary judgment was signed, Plaintiff Albert Bossley non-suited Dallas County Mental Health and Mental Retardation without prejudice. Further, Plaintiffs' moved the trial court for: 1) leave to file interrogatory answers as summary judgment proof; 2) leave to file a fourth amended original petition; and 3) for an order directing parties to file original depositions with the court. Plaintiffs also moved for a new trial.

The summary judgments were then vacated and Plaintiffs were granted leave to file their fourth amended original petition (which had been previously filed) and were granted leave to file interrogatory answers as summary judgment proof. The Court also ordered the parties to file original depositions with the Court but denied Plaintiff Albert Bossley's motion to non-suit without prejudice Defendant Dallas County Mental Health and Mental Retardation. The summary judgments were then granted again in favor of all defendants on all points. This appeal was then perfected.

POINTS OF ERROR

POINT OF ERROR ONE

The trial court erred in granting summary judgment because the defendants are not entitled to official immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to official immunity.

POINT OF ERROR TWO

The trial court erred in granting summary judgment because the defendants are not entitled to governmental immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to governmental immunity.

POINT OF ERROR THREE

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

POINT OF ERROR FOUR

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00.

FACT STATEMENT

In August, 1988, Roger Arthur Bossley was a deeply troubled young man in desperate need of competent medical care. He was suffering from the mental disease of major depression and had made an unsuccessful suicide attempt on July 12, 1988. Roger's major depression had been preceded by a number of employment and social setbacks. Following the unsuccessful suicide attempt, Roger had been taken to Parkland Hospital, transferred to Mental Diagnostic Center and eventually transferred to Hillside Center.

On August 9, 1988, after being ridiculed and laughed at by an employment counselor at the Texas Rehabilitation Commission, Roger asked another patient at Hillside Center where he could get a gun so he could kill himself when he got out of Hillside. After these statements were communicated to Dr. Urschel by another patient on August 9, 1988, Dr. Urschel wrote in Roger's chart that he considered Roger to still be "a definite risk to himself." However, no suicide precautions or elopement precautions were ordered and Roger was allowed to remain at the open Hillside facility.

In documents which were to transfer Roger back to the Mental Diagnostic Center, Dr. Kamphaus swore under oath that Roger Bossley "has remained suicidal despite lengthy hospitalization here" (Tr. vol. I., page 202) and that "I am further of the opinion that the Patient presents a substantial risk of serious harm to self of [sic] others if not immediately restrained, the detailed basis for this opinon [sic] being: that the patient has verbalized the

intent to kill himself after he leaves the hospital, therefore he needs further hospitalization." (Tr. vol I., page 202)

At this point, Dr. Kamphaus was aware that Roger had extreme anxieties about being transferred back to the Mental Diagnostic Center and to Terrell State Hospital. Despite Roger Bossley's known major depression, his known suicidal condition, his fears of being transferred to the Mental Diagnostic Center and to Terrell State Hospital and his statement two days earlier that he intended to kill himself, Dr. Kamphaus did not order any suicide precautions, elopement precautions, or seclusion prior to transfer.

At approximately 11:23 a.m. on August 12, 1988, Roger was left completely unattended near the front door of Hillside Center. The inner self-locking door, usually closed for the protection of patients considered to be suicidal or elopement risks, or who were to be transferred to Mental Diagnostic Center, had been left open.

At approximately 11:23 a.m., Angela Jones, a female technician at Hillside Center, returned from group therapy, retrieved her purse from the nurses station and unlocked and opened the front door. Immediately prior to unlocking and opening the front door, Angela Jones did not check Roger Bossley's location, did not ensure that some one was carefully monitoring Roger within their sight at all times and did not ensure that the inner self-locking door was closed and locked. As Angela Jones opened the unlocked door, Roger predictably ran through the open door and down to Interstate 30, approximately one half mile away. No male staff technicians were present to immediately pursue and restrain Roger.

Eventually staff members did pursue and catch up to Roger when he was already on the highway. MHMR employees through their actions then forced Roger in his known suicidal condition to decide between being transferred back to the Mental Diagnostic Center and Terrell State Hospital, or killing himself by jumping in front of highway traffic. Roger Bossley, mentally ill and literally "scared to death" of Terrell State Hospital, chose the later course and was killed when he jumped in front of a truck.

BRIEF OF THE ARGUMENT

Summary of Argument

The defendants are not entitled to official immunity. Article 5547-18 of the Texas Mental Health Code establishes the general rule that all persons who act negligently in connection with the treatment of mental health code patients will not be protected by official immunity. The statute has two exceptions which are not applicable to this case.

The defendants are not entitled to governmental immunity. The individual defendants are not protected by governmental immunity until there is a final judgment or settlement with the governmental unit. There has been no settlement or final judgment to date with MHMR. Further, MHMR is not entitled to governmental immunity because the allegations of negligence against MHMR involve both "condition" and "use" of property.

A genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

The negligent acts and omissions of the defendants were causes in fact of Roger Bossley eloping the facility. Further, according to the testimony of the defendants themselves, Roger's self destructive act was a foreseeable result of defendants' negligence.

A genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00. Unless a judgment or settlement with the government unit has occurred, individuals are not entitled to any protection or limitation of liability from the Tort Claims Act.

Argument and Authorities

POINT OF ERROR ONE

The trial court erred in granting summary judgment because the defendants are not entitled to official immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to official immunity.[1]

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[1] At the outset it should be noted that the defendant doctors are not claiming that they were not negligent in connection with Roger Bossley's death. Indeed, such a position would be inconsistent with sworn statements made by the defendant doctors themselves. Dr. Kamphaus swore in an affidavit one day before Roger's death that Roger was "suicidal" and that he presented a "substantial risk of serious harm" to himself if not "immediately restrained." (*See* JK Exhibit 24; Tr. vol. II, page 234) Dr. Urschel has sworn that if a patient presents a substantial risk to himself if not immediately restrained, than the standard of care requires that the patient be placed in seclusion. *See* Urschel Depo 153:23. Neither doctor placed Roger in seclusion. Dr. Urschel swore that if Roger had

Article 5547-18 of the Texas Mental Health Code establishes the general rule that all persons, including psychiatrists, who are treating patients entrusted to them under the Texas Mental Health Code are not entitled to official immunity for their negligent acts. This article, entitled "Liability", provides in relevant part as follows:

> All persons acting in good faith, reasonably, **and without negligence** in connection with examination, certification, **apprehension, custody, transportation, detention, treatment,** or discharge of any person or in the performance of any other act required or authorized by this code shall be free from all liability, civil or criminal, by reason of such action. Provided, however, that a physician performing medical examinations and providing information to courts in any court proceeding held pursuant to the code or a physician providing information to peace officers to demonstrate the need for a person to be apprehended in an emergency detention under this code shall be considered an officer of the court and shall not be held liable for such examination or testimony when acting without malice . . . (emphasis added)

Article 5547-18 of the Texas Mental Health Code was discussed by the Texas Supreme Court in *James v. Brown*, 637 S.W.2d 914 (Tex. 1982). *James* involved a suit for damages against three psychiatrists arising out of an involuntary hospitalization proceeding under the Texas Mental Health Code. On application of her son and daughter, a woman was hospitalized and examined by

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been placed in seclusion he could not have escaped. *See* Urschel Depo 162:2.

three psychiatrists. All three doctors filed reports with the probate court stating that the woman was mentally ill and likely to cause injury to herself or others if not immediately restrained. The woman obtained a writ of habeas corpus releasing her from the hospital. She thereafter sued the three doctors alleging, *inter alia*, negligent misdiagnosis. The trial court granted summary judgment in favor of the defendant doctors.

In upholding the summary judgment, the court of appeals held that publication of the doctors' opinions pursuant to the Mental Health Code was privileged even though the doctors may have been negligent in their diagnosis. The Supreme Court reversed. After setting forth the text of TEX. REV. CIV. STAT. ANN. art. 5547-18, the Supreme Court stated:

> It is a well settled rule of construction that the "express mention or enumeration of one person, thing, consequence, or class is equivalent to an express exclusion of all others." [citation omitted] The plain implication of art. 5547-18 is that persons acting in bad faith, unreasonably, and negligently in connection with mental health proceedings are not free from liability. Fact questions regarding bad faith, unreasonableness, or negligence, therefore, should preclude a summary judgment on otherwise valid causes of action."
>
> A cause of action for medical malpractice is essentially a negligence action. [citation omitted] A psychiatrist owes a duty to his patient to exercise that degree of skill ordinarily employed under similar circumstances by similar specialists in the field. [citation omitted] We hold that, as a matter of law, Tex. Rev. Civ. Stat. Ann. arts.

> 5547-1 et seq. impose such a duty on psychiatrists examining patients entrusted to them under the Mental Health Code. Article 5547-18 excuses from liability only those who act in good faith, reasonably, and *without negligence*." 637 S.W.2d at 918.

Article 5547-18 was thereafter amended to include two exceptions to the general rule of liability for negligence. The two exceptions are when physicians are "performing medical examinations and providing information to courts in any court proceeding held pursuant to the code" or "providing information to peace officers to demonstrate the need for a person to be apprehended in an emergency detention under this code." Article 5547-18, *supra*.

Plaintiffs allegations of negligence do not arise out of the exceptions to liability quoted above. First, the exceptions are applicable to physicians only and do not apply to the non-physician defendants. Second, Plaintiffs allegations of negligence are not based on how the defendant doctors examined Roger Bossley or provided information to the court. Rather, plaintiffs' allegations of negligence against all defendants arise out of the "apprehension, custody, transportation, detention [or] treatment" of Roger Bossley. According to the express language of Article 5547-18, these acts and omissions, if negligent, are not protected by official immunity.

Since the result of this case is expressly controlled by statute and the holding of *James v. Brown, supra*, this court should not consider the argument advanced by the defendant doctors below that they are entitled to official immunity simply because they were working for a government

and acting in "good faith." Even when considered, however, such an argument must fail. Indeed, no Texas case has ever granted a doctor immunity based on such an argument.

The current status of Texas common law concerning medical doctors and official immunity is found in *Armendez v. Tarrant County Hospital District,* 781 S.W.2d 301 (Tex. Civ. App. – Fort Worth 1989, writ granted) *Armendez* contains the common sense holding that a doctor is not entitled to official immunity unless he can show that his activities were uniquely governmental. The court in *Armendez* explained that "the purpose for official immunity is not served when an employee has the same duty and therefore no greater risk of liability than an employee performing the same duties in the private sector." 781 S.W.2d at 306

The defendant doctors attempt to fit within the "uniquely governmental" requirements of *Armendez* by claiming in affidavits that they had to treat each patient and that they could not transfer a patient to a private facility. However, the doctors fail to explain how the responsibility of accepting each patient transformed such treatment into a uniquely governmental activity or increased their risk of liability.[2] Further, the claimed

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[2] It would have been difficult for the defendant doctor's volume of patients at Hillside to lead to an increased risk. Dr. Kamphaus has sworn that he and Dr. Urschel were only responsible for a total of six patients at Hillside Center. *See* Kamphaus Depo 17:16, 82:23.

inability to transfer a patient to a private facility is inconsistent with the following sworn testimony by Dr. Kamphaus:

> Q. You have one of three options at [Mental Diagnostic Clinic]?
>
> A. [By Dr. Kamphaus] Discharge, Terrell, Hillside. *Also, private hospital. I mean, patients can be committed to private hospitals if they have insurance to pay for such things.* (emphasis added) *See* Kamphaus Depo, 110:11-14.

The defendant doctors also argue that their activities were uniquely governmental because article 5547-80 of the Texas Mental Health Code requires them to provide the "least restrictive appropriate setting for treatment." This argument is without merit for two reasons. First, there is no suggestion that this provision changed the standard of care with regard to the care and treatment of patients diagnosed as being suicidal. Indeed, Dr. Urschel testified that the Hillside patients deserved to get and got the same quality of care as patients in a private institution. *See* Urschel Depo, 25:2-6.

Second, the defendant doctors had already diagnosed Roger Bossley as being suicidal and had ordered him to be transported back into a locked environment (Mental Diagnostic Center) by sheriffs who would have handcuffed Roger for his own safety. The doctor's argument that the requirement of a "least restrictive appropriate setting for treatment" somehow uniquely affected their treatment decision concerning suicide or elopement precautions for Roger therefore cannot be taken seriously.

In sum, there is nothing "uniquely governmental" about providing appropriate suicide precautions to a patient who has been diagnosed as being suicidal and at a substantial risk to himself if not immediately restrained. There is no summary judgment evidence which indicates that the standard of care for treating a suicidal patient is any different at Hillside than at a private facility. Further, there is no summary judgment evidence which reflects that the defendant doctors were exposed to any greater risk of liability at Hillside than at a private institution. The defendant doctors simply did not adhere to accepted standards of care for treating suicidal patients. Therefore, the defendant doctors are not entitled to official immunity and must remain accountable for their negligent failure to place Roger Bossley on appropriate suicide and elopement precautions.

Finally, the rationale in *Armendez* is consistent with article 5547-18 of the Texas Mental Health Code and conflicts with the argument advanced by the defendants. As previously discussed, article 5547-18 draws the distinction between uniquely governmental acts of medical doctors (performing medical examinations and providing information to courts in court proceedings and to peace officers) and acts of medical doctors which are the same as in private facilities. Immunity is granted in the former, but not in the later. In sum, neither the Texas Mental Health Code nor Texas common law supports the defendants' claim of official immunity.

POINT OF ERROR TWO

The trial court erred in granting summary judgment because the defendants are not entitled to governmental immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to governmental immunity.

In the court below, the defendants claimed an entitlement to governmental immunity under TEX. CIV. PRAC. REM. CODE Section 101.106 because there was no "use of property" to waive the governmental immunity of MHMR. This argument fails for two reasons. First, an individual employee is not protected by Section 101.106 until there has been a final judgment or settlement with the governmental unit. There has been no settlement or final judgment to date with MHMR. Second, as discussed below, the allegations of negligence against MHMR involve both "condition" and "use" of property.

Plaintiffs have alleged, *inter alia*, that Roger Bossley was allowed to escape the Hillside facility because the inner self-locking door was negligently kept open and the outer door was negligently unlocked and opened by an MHMR employee. Stated within the definitional terms of the Texas Civil Practices and Remedies Code, the "condition" of the inner door (unlocked and open) and the "use" of the outer door by a center employee (unlocking and opening the door without checking Roger Bossley's location or ensuring that the inner door was locked) proximately caused Roger Bossley's death by allowing him to escape the facility in a known suicidal condition. These alleged facts fall well within the waiver provisions

of the Civil Practices and Remedies Code as interpreted by the Texas Supreme Court.

In *Overton Memorial Hospital v. McGuire*, 518 S.W.2d 528 (Tex. 1975), a hospital patient was injured after falling from a bed not equipped with protective side rails. The Supreme Court held that the patient's injuries were caused from some condition or use of tangible property. In *Lowe v. Texas Tech University*, 540 S.W.2d 297 (Tex. 1976), a football player was injured after a coach ordered him to remove a knee brace. The Court held that the negligent failure to furnish proper protective equipment brought the case within the statutory waiver of immunity arising from some condition or use of personal property.

In the most recent Texas Supreme Court case, *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169 (Tex. 1989), a patient of a state mental institution drowned because he was not furnished a life preserver while swimming. In holding that the case involved a "condition or use" of property, the Supreme Court stated that "a life preserver was just as much a part of Robinson's swimming attire as the knee brace was part of the uniform in *Lowe*." 780 S.W.2d 171. In the instant case, properly locked doors at Hillside Center were just as much a part of Roger's required protective equipment as the life preserver in *Robinson*, the knee brace in *Lowe* and the bed rails in *Overton*.

In the trial court, the defendant doctors cited *Weeks v. Harris County Hospital District*, 785 S.W.2d 169 (Tex. App. – Houston [14th Dist.] 1990, writ denied) in support of their argument that MHMR's negligence did not involve "use or condition" of property. The defendant doctors

claimed that *Weeks* was decided on "very similar facts." While it is true that *Weeks* is a suicide case, the similarity ends there. Unlike the instant case, Weeks involved a patient that was never admitted to the hospital. Further, staff employees never assumed a duty of care toward the patient or furnished the patient with any equipment. The court concluded that under such facts there was neither misuse of property nor circumstances adequate to apply "nonuse" of property to support state liability.

Interestingly, the *Weeks* opinion cites and distinguishes the *Overton, Lowe* and *Robinson* cases, observing that "[i]n all of these cases the state agency provided equipment that failed to provide for the established needs of the individual; the materials were therefore defectively incomplete for their intended use." 785 S.W.2d at 171. MHMR provided Hillside Center as a holding area for Roger until he could be transported by the Sheriff's Department back to Mental Diagnostic Center. The condition of Hillside Center failed to provide for the established needs of Roger in that the inner self-locking door was not closed. Hillside was therefore defectively incomplete for its intended use as a suicide holding area. Further, much like the coach in *Lowe* who removed his player's protection by ordering the removal of the knee brace, a MHMR employee removed Roger Bossley's protection by unlocking the front door when the inner self-locking door was open and Roger's position was unknown.[3]

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[3] The foregoing discussion focuses on the condition of the inner self-locking door and the "use" of the outer door by a person other than the defendant doctors. It is not necessary to

The remainder of the cases cited by the defendant doctors in the trial court are also readily distinguishable. In *Beggs v. Texas Department of Mental Health and Mental Retardation*, 496 S.W.2d 252 (Tex. Civ. App. – San Antonio 1793, writ ref'd), the sole act of negligence alleged was that the decedent was negligently released to a private nursing home. The plaintiff did not allege any condition or use of property. Similarly, in *Texas Department of Corrections v. Herring*, 513 S.W.2d 6 (Tex. 1974), there were no allegations of negligence involving use or condition of property. Finally, the string of lower court cases cited in support of the claim that plaintiffs allegations assert only nonactionable "nonuse" of property were all decided before the supreme Court's clarifying opinion in *Robinson, supra.*

POINT OF ERROR THREE

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

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reach the issue of whether the negligence of the defendant doctors involved the "condition or use" of property because governmental immunity does not protect individual employees absent a settlement or judgment with the government employer. However, the failure of the defendant doctors to order the double doors locked and their failure to place Roger behind a locked door in the Hillside seclusion room would constitute negligence involving a "condition or use" of property.

In the trial court, all defendants claimed that Roger Bossley's death was not a foreseeable result of their negligence as a matter of law. Such an argument is not supported by Texas law and is inconsistent with testimony given by the defendants themselves.

In Texas, the most important factor in determining the liability of a hospital for failing to prevent suicide of a patient is whether the hospital authorities could reasonably have anticipated that the patient might harm himself. *See Weeks, supra* at 172 and cases cited therein.

Dr. Kamphaus, as previously indicated, swore the day before Roger's death that Roger was at a substantial risk of harm to himself if not immediately restrained. Dr. Kamphaus further testified that he would have been concerned if Roger left the facility on August 10th because Roger had made the statement that "he might attempt to kill himself after leaving the hospital." (*See* Kamphaus Depo, 189:19; Tr. vol. II, page 225) Dr. Kamphaus felt that Roger was at risk for harming himself if he had left or been discharged from the hospital. (*See* Kamphaus Depo, 204:23; Tr. vol. II, page 227) Dr. Kamphaus also knew that Roger had a fear of Terrell and "didn't want to go" to Terrell. (*See* Kamphaus Depo, 193:7; 206:5; Tr. vol. II, page 288).

Dr. Urschel also testified that he would not have allowed Roger to leave the facility after August 9th in light of the information he was getting about Roger. (*See* Urschel Depo, 133:2; Tr. vol. II, page 238). Dr. Urschel agrees that if Roger did not want to go to Terrell, was a definite risk to himself and had voiced the intention to

kill himself, it was foreseeable that Roger was an elopement risk. (*See* Urschel Depo, 139:21; Tr. vol. II, page 239).

Angela Jones testified that one of the reasons the front door is locked at Hillside when a patient is being transferred back to MDC is that the client may try to leave and "run out in the street or something to harm themselves." (*See* Jones Depo. 49:9; Tr. vol. II, page 242). Angela was aware Friday morning that if Roger was allowed to go outside the facility there was a potential for him harming himself. (*See* Jones Depo. 55:13; Tr. vol. II, page 243).

Danny Williams testified he was aware the morning of the 12th that Roger had a great fear of being transferred to Terrell. (*See* Williams Depo, 65:10; Tr. vol. II, page 245). Danny also testified that during shift change the morning of the 12th other staff discussed that Roger was going to try to escape the unit so he would not have to go to Terrell. (*See* Williams Depo, 66:5; Tr. vol. II, page 246).

Florence Bates testified that a person suffering form major depression that is considered to be suicidal can be irrational and unpredictable. (*See* Bates Depo, 58:23; Tr. vol. II, page 248). Florence further testified that such suicidal and irrational behavior could possibly result in a patient at one moment appearing to be hitchhiking down the road and the next moment jumping in front of a vehicle. (*See* Bates Depo. 59:13; Tr. vol. II, page 249).

In sum, Texas law does not require that the exact methodology of Roger Bossley's death be precisely predicted. The defendants knew that Roger was suicidal and a danger to himself if he were allowed out of Hillside

before the Sheriff's Department arrived. Roger Bossley's self-destructive act was not only foreseeable, it was the exact type of act the defendant doctors were attempting to prevent by transferring Roger back to MDC and that the Hillside employees were responsible for preventing.

POINT OF ERROR FOUR

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00.

Each of the individual defendants claimed in the trial court that their liability was limited to the statutory limit of $100,000.00 pursuant to TEX. CIV. PRAC. REM. CODE Section 101.023. Texas law does not recognize such a limitation for individuals.

Unless a judgment or settlement with the government employer has occurred, individual employees are not entitled to any protection from the Tort Claims Act. *See Eubanks v. Wood*, 304 S.W.2d 567 (Tex. Civ. App. – Eastland 1957, writ ref'd n.r.e.) (although city was not liable for negligent conduct of police officer, police officer remained individually liable); *See also Hargrove v. City of Rotan*, 553 S.W.2d 246 (Tex. Civ. App. – Eastland 1977 no writ).

The defendant doctors did not cite any case where an individual was granted a limitation of liability under the Tort Claims Act or the Texas Civil Practices and Remedies Code. Indeed, in *Madisonville Independent School District v. Kyle*, 658 S.W.2d 149 (Tex. 1983) the Texas Supreme Court

stated that the individual employee co-defendant would "remain jointly and severally liable for the entire amount of the judgment" (which was in excess of $100,000.00). In the only other case cited by the defendant doctors, *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978) the issue of individual liability was neither presented by the facts nor discussed by the Court. In short, the Texas Civil Practices and Remedies Code does not grant immunity or limit the liability of individual employees unless there has been a settlement with or judgment against the government employer.

Conclusion

In conclusion, the trial court erred in granting defendants motions for summary judgment because the defendant are not entitled to official immunity or governmental immunity. Alternatively, fact issues exist as to whether defendants are entitled to official immunity and governmental immunity. Further, a genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages. Finally, a genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00.

PRAYER FOR RELIEF

WHEREFORE, appellants respectfully request that the summary judgments granted in favor of defendants be reversed and this case be remanded to the trial court for a trial on the merits. Appellants further request any

and all such other relief to which they may be justly entitled.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Bar Card No. 15154300
2435 N. Central Expy, Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600

ATTORNEY FOR APPELLANTS

Certificate of Delivery

I certify that a true and correct copy of the foregoing Appellants' Brief has been hand delivered to all counsel of record in this cause on this 10th day of April, 1991.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.